IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,

PETITIONER,

vs.

THE UNITED STATES

MOTION OF PETITIONER TO REVERSE AND REMAND.

Motion.

Comes now the petitioner, Williamsport Wire Rope Company, by its Counsel, James Walton and Clarence A. Miller, and respectfully moves that this Court reverse the judgment of the Court of Claims entered in this cause on May 2, 1927, and remand this case to that Court for hearing and determination on its merits.

Statement in Support of Motion.

In support of this motion the petitioner respectfully shows that:

1. The question presented is whether, under the provision of Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. L. 1057, 1093), providing for a special assessment and a special method of determining the war-profits and excess-profits tax rate of certain taxpayers where the application of the ordinary statutory formula provided in said Act (Sec. 301) works exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of said sections and the tax computed as provided in said sections, the decision of the Commissioner of Internal Revenue as to whether the special method should be applied is final or subject to review by the Courts. (See Brief for the United States, pp. 1 and 2).

2. This question is similar to that presented in *Blair, Commissioner* v. *Oesterlein Machine Company*, No. 210, October Term, 1927. (See Brief for the United States, p. 8).

3. This Court, on November 21, 1927, *held*, in *Blair, Commissioner* v. *Oesterlein Machine Company*, No. 210, October Term, 1927, (48 S. C. Rep. 87), that the determination of the Commissioner of Internal Revenue as to whether the special method of determining the war-profits and excess-profits tax rate provided by Sec-

tions 327 and 328 of the Revenue Act of 1918 should be applied is *not* final, but may be reviewed judicially.

4. The decision of this Court in *Blair, Commissioner v. Oesterlein Machine Company*, No. 210, October Term, 1927, is determinative of the question here presented. (See Brief for the United States, p. 8).

Respectfully submitted,

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January 26, 1928.

Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

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NO. 337

THE WILLIAMSPORT WIRE ROPE COMPANY,
Petitioner,

v.

THE UNITED STATES.

BRIEF FOR PETITIONER

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THE WILLIAMSPORT WIRE ROPE COMPANY,
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BRIEF FOR PETITIONER

I.

Preliminary Statement.

This case is before this Court by virtue of a writ of *certiorari* to the Court of Claims granted November 28, 1927 (tr. 37).

II.

Opinion of the Court of Claims.

The opinion of the Court of Claims (tr. 24) has not been officially reported, but will be found in 6 A. F. T. R. 6774.

III.

Jurisdiction of This Court.

The judgment of the Court of Claims was entered May 2, 1927 (tr. 33). The petition for writ of *certiorari* was filed June 29, 1927 (tr. 34), and granted November 28, 1927 (tr. 37).

IV.

Statement of the Case.

The facts are adequately stated in the transcript, beginning on page 1. A summary of the facts also appears in the preamble to the opinion of the learned court below, pages 24, 25 and 26.

In briefest possible form, the facts are—

That petitioner, a Pennsylvania corporation, duly filed its income and profits tax return for the calendar year 1918, which return showed a total tax liability of $306,381.77, and the tax shown thereby was paid within the time prescribed by law. The amount of the tax was in excess of 50% of the company's taxable income, but the taxpayer did not avail itself of the right granted under Section 328 (b), of paying as tax, a sum equal to 50% of its net income and petitioning for assessment under Section 328. Subsequently, the Commissioner of Internal Revenue caused an examination to be made of petitioner's books of account, and as a consequence of said examination, a number of alleged adjustments or corrections were made in petitioner's figures, the most consequential of which was an alteration in the book value of petitioner's inventories of raw material, work in process and finished

merchandise. The Commissioner, through his field revenue agents, contended that the amount of petitioner's January 1, 1918, inventory should be increased $229,326.32, and that its closing inventory on December 31, 1918, should be increased $317,178.54. Through this change in the book value of the inventories, an alleged additional tax of $89,094.85 was computed against the petitioner and, despite its protests, the amount was assessed, levied and collected on July 12, 1920. Petitioner contends that through this arbitrary adjustment of its inventories, which adjustments were carried all the way back to the year 1914, an abnormal condition was forced upon it, and it was thereby entitled to a computation of its tax under Section 328. Accordingly, on June 14, 1924, petitioner drafted and filed with the Commissioner, a claim for refund of $100,000.00, stating that the amount so claimed represented the amount by which the tax as computed by the Commissioner under Section 301 exceeded the tax when computed under Sections 327 and 328. After extended conferences and negotiations the Commissioner declined to refund and suit was thereafter duly instituted in the Court of Claims. In its petition (p. 9, tr.) taxpayer set forth a number of particulars of abnormality in both its taxable income and invested capital. On January 18, 1927, the defendant filed a special demurrer, attacking the sufficiency of the petition, and, secondly, raising the question of the jurisdiction of the court. On argument upon the demurrer on February 21, 1927, the defendant confined the issue to the question of the court's jurisdiction, and the court, in its opinion (tr. p. 24) sustained the demurrer upon the grounds of lack of jurisdiction. This was before the decision of this Court in *Blair v. Osterlein Machine Company*, No. 210, October Term, 1927. On January 26, 1928, the petitioner filed in this Court a

motion to reverse and remand on the authority of *Blair v. Osterlein Machine Company, supra.* Action on this motion was, by order of this Court of April 9, 1928, deferred until the hearing on the merits, and the case was specially set for argument April 23, 1928, after the cases heretofore assigned for that day.

V.

Question Presented.

The question presented is whether a Federal Court has jurisdiction to review the action of the Commissioner of Internal Revenue in computing or refusing to compute (the latter is the case here) a corporation's income and profits tax under the provisions of Section 327 and 328 of the Revenue Act of 1918, 40 Stat. L. 1057 96, C. 18. In other words, is the application or non-application of these two particular sections of the Revenue Act within the exclusive unreviewable discretion of the Commissioner of Internal Revenue?

VI.

The Statute.

The relevant sections of the statute are 301, 325, 326, 327 and 328. They are quoted verbatim in the transcript beginning on page 17. The essential parts thereof read:

> "Sec. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> * * * * * * * *
>
> (d) Where upon application by the corporation the Commissioner finds and so declares of record that

the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income,

profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertain shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from time the installment was due."

* * * * * * *

The pertinent provisions of Section 145 of the Judicial Code are as follows:

The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon * * * any law of Congress * * *.

VII.

Argument.

The decision of this court in *Blair v. Oesterlein Machine Company*, No. 210, October Term 1927, 47 S. C. Rep. 87, is controlling in this case. The learned Solicitor concedes this in his brief. But the difficulty is the Court of Claims, in subsequent cases, has stated from its bench that Oesterlein does not control Williamsport nor control any other kindred cases which have since been before it. Thus it becomes appropriate to consider first, wherein the two cases differ and second, the reasons advanced by the Court of Claims in support of its opinion.

OESTERLEIN CASE COMPARED WITH WILLIAMSPORT.

The Oesterlein case was before this court upon the question of an alleged unreviewable discretionary power in the Commissioner under sections 327 and 328 as opposed to the appellate reviewing power of the United States Board of Tax Appeals. This Williamsport case, which arose before Congress created the Board, is here upon the same question of alleged unreviewable discretionary power in the Commissioner, under the same sections, as opposed to the statutory jurisdiction vested in the Court of Claims (and other Federal Courts) to try income tax cases (claims against the Government) *de novo*. In the former case, the correct amount of the tax has yet to be determined by the Board. In the latter, the entire sum imposed as alleged additional tax has per force, been paid under protest.

The Oesterlein case was argued before this court upon the theory that if the Board of Tax Appeals had power and jurisdiction to hear and determine tax questions under

sections 327 and 328, the Court of Claims and the Federal courts must have like power and jurisdiction; that such corresponding jurisdiction in the Federal Courts would mean the determination by them of the twofold question, is the taxpayer entitled to assessment under sections 327 and 328?—and what is his correct tax under those sections?— together with the further necessary jurisdiction to enter judgment for the taxpayer in the amount of any excess tax imposed upon him by the Commissioner through having wrongfully applied or denied assessment under the said sections 327 and 328;

AND THIS COURT DECIDED THE QUESTION IN THE AFFIRMATIVE.

The only possible theory upon which it might be contended that there could be jurisdiction in the Board of Tax Appeals and still no jurisdiction in the Federal courts would be that Congress vested in the Board some particular added judicial power not heretofore exercised by the courts. But the statute discloses the exact contrary. The Board has the most limited jurisdiction and merely serves to give the taxpayer an additional hearing before he is compelled to pay. Observe—

> Sec. 900 (k) Act of 1924. * * * The Board shall be an independent agency in the executive branch of the Government.

Certainly there is no added judicial power there. And observe what the Senate Finance Committee says (p. 42) in reporting the 1924 Act to the Senate—

> * * * The board is to act independently not only of the Bureau of Internal Revenue, but of the Treasury Department. The taxpayer has the opportunity of appealing to this board before paying the amount of any additional assessment if he has not had

the opportunity of being heard before the assessment was made. The contentions of both the taxpayer and the Bureau of Internal Revenue will be heard and considered and the decision of the board will be conclusive on both parties on the question of assessment.

In the event the decision is against the taxpayer, he will be required to pay the tax according to the assessment *and have recourse to the courts* for the recovery thereof. If the decision is against the Government it will likewise have recourse to the courts. • • •

The clincher of the whole thing is the manifest recognition by the Senate Committee that a section 327 and 328 case can be taken to court after a Board of Tax Appeals decision. But there has been no additional statutory jurisdiction conferred on the Courts respecting such cases. Clearly and indisputably then, there must have been the same jurisdiction in the Federal courts before the Board was created.

WHAT ARE THE OBSTACLES TO JURISDICTION WHICH THE COURT OF CLAIMS FINDS?

The learned Solicitor sets these forth at considerable length, p. 12 to 17, his brief on motion to reverse and remand. For brevity we may classify the difficulties which the Court of Claims finds into, first

"GREAT PRACTICAL DIFFICULTIES."

The same argument was advanced in Oesterlein. Learned counsel for the Commissioner laid heavily upon it. But this court said

> "But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by Sections 327 and 328. The determination is to be made upon prescribed and

ascertainable data and is to conform to standards set up by the statute, all defined with such definiteness and clarity to be susceptible of judicial scrutiny."

The next difficulty of the learned court below is that by taking jurisdiction it would become necessary for the court to compute the tax and thereby

ENCROACH ON THE EXCLUSIVE PREROGATIVES OF THE COMMISSIONER.

Of course the court must compute the correct tax. That is what the court does and has been doing in every one of the tens of thousands of tax cases. Why? Because that is the indispensable prerequisite to the determination of the amount of a taxpayer's judgment for refund. It is true that counsel generally stipulate and thus relieve the court of this burden. But without stipulation, the court must compute the correct tax in every case where overpayment is contended by the taxpayer. In *U. S. v. Emery*, 237 U. S. 28 and *Rock Island R. R. v. U. S.*, 254 U. S. 141, this court stated, in substance, that it was the Commissioner's duty to determine, assess and levy the tax, but that does not mean that a Federal court may not compute the tax correctly when the Commissioner refuses to do it. To say that a court is without jurisdiction to compute and determine the correct tax is simply to say, in effect, that a court is without jurisdiction to render a judgment for a refund.

The next obstacle stated by the court below is—

"Plaintiff did not, in the beginning, question the amount of taxes it should pay. • • • No complaint was lodged against the exaction until additional taxes were assessed and demanded.

Then for the first time the plaintiff insists upon its alleged right to special assessment."

It is not surprising that a court, heavily burdened with tax litigation, should now find it hard to understand that any taxpayer would be so credulous as to believe that if the initial payment of its tax were excessive, the amount of the excess would be voluntarily refunded by the Commissioner; a taxpayer who would take that risk rather than engage in a controversy with his government during a time of national peril. This petitioner confesses it did so. Moreover, no claim for assessment under sections 327 and 328 would ever have been made if the Commissioner had left the company unmolested. But what has that to do with the question of jurisdiction?

Another difficulty of the lower court is stated, (p. 31, tr.)

"THE PLAINTIFF, IN OUR VIEW OF THE CASE, HAS MISTAKEN THE REMEDY."

It is well settled that there can be no remedy by mandamus. It is similarly definitely settled that it cannot be by injunction to restrain the Collector (*Graham v. du Pont*, 262 U. S., 234).

If there is any possible way to test the legality or correctness of the amount of an income tax exaction other than to pay the tax and sue to recover, what can it be?

The learned court below states another difficulty—

> "We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder * * *. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due."

The error here arises from assuming that the law provides for two distinct and different taxes,—one under

section 391 and the other under 327 and 328. But the fact is there is only one tax, and that is the correct tax, which may be under either of the sections, according to the circumstances. In our complaint, which for the purpose of demurrer must be taken as true, we have alleged the imposition by the Commissioner of an incorrect excessive tax, the payment thereof, a refund filed and rejected. No matter how burdensome it might be to hear our case (which it will not be at all) and no matter what formula, method or line of reasoning the Commissioner employed in his computations, the jurisdiction is unaffected and the question remains, *has the petitioner been forced to pay an excessively illegal tax under the law?*

SOLICITOR GENERAL FULLY WARRANTED.

The action of the learned Solicitor in conceding that this case is controlled by Oesterlein is abundantly warranted and merits the commendation of this court.

VIII.

Conclusion.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded for hearing and determination on its merits.

Respectfully submitted,

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